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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES, *Petitioners*,

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

I. WAIVER OR ESTOPPEL

When the Maritime Commission proposed to collect profit sharing percentages in excess of 50 percent, all industry associations, including one of which Eastern was a member, protested the sliding scale charge to the extent that it exceeded the 50 percent specified in sec-

tion 709(a).[1] As a result of these protests, Maritime amended clause 13 to add the preliminary payment language, and issued regulations and instructions unqualifiedly reserving the charterers' rights to dispute the legality of any of the charter provisions, including the sliding scale.[2]

One of the indicia of acquiescence relied upon by the Government (Govt. Br. 6) is that Eastern filed its accountings for additional charter hire showing computations at the sliding scale rates.[3] But these account-

[1] The Government has overlooked its own affidavits in stating (Govt. Br. 7, ftn. 5) that "nothing in the record shows that Eastern was a member of these [steamship] associations, ever subscribed to that view, or made any protest whatsoever until February 15, 1955 . . ." The fact is that Eastern was a member of the American Merchant Marine Institute, which protested on August 15, 1946 (East. Br. 38-39, ftn. 43). Government affiant Bouldin (R. 175) mentions the American Merchant Marine Institute, *"to which Eastern Gas belonged."* (Emphasis added.) Thus, Eastern is directly identified in the record with the protests made in August 1946 before the charters were signed.

[2] See the material cited by Eastern (East. Br. 38-39, ftns. 43-45), as well as the decision in *American-Foreign Steamship Corp.* v. *United States*, 291 F. 2d 598, 603, 613-15 (2d Cir.), *cert. denied*, 368 U.S. 895 (1961). The purpose of the clause 13 reservation was there confirmed by government counsel. It is discussed in the decisions in *American Mail Line, Ltd.* v. *United States*, 213 F. Supp. 152, 156-57 (W.D. Wash. 1962), and *American President Lines, Ltd.* v. *United States* (N.D. Cal.—Oct. 10, 1963; East. App. A, pp. A9-10).

[3] When the charters were signed it was not known whether they would result in profits to be shared; hence, there was no occasion to litigate at that time. Some charterers sustained losses or did not make sufficient profits to require payments of additional charter hire in excess of 50 percent. Of the approximately ninety companies who chartered vessels, only thirty have filed claims to recover sliding scale amounts.

ings were required to be submitted in this form by clause 28 of the charters. (See standard charter form, 46 C.F.R. § 299.130, c. 28.). The Government's contention was squarely presented and rejected in *United States* v. *Moore-McCormack Lines, Inc.*, 308 F. 2d 866 (4th Cir. 1962), *cert. denied*, 372 U.S. 944 (1963).

The cases cited by the Government (Govt. Br. 14, 15) are not in point. To the extent that any of them involve contracts at all,[4] they hold only that the contracts are binding where no statute prescribes conflicting terms or a conflicting policy. In the present case, the statute (section 709(a)) prescribes the precise formula for additional charter hire that must be included in the contract. If the parties had attempted to depart from this formula, their attempt would have to be disregarded and the statute enforced according to its terms.[5] "Estoppel could not become the means of successfully avoiding the requirement of the act. . . ." *Pittsburgh, C., C. & St. L. R. Co.* v. *Fink*, 250 U.S. 577, 583 (1919). *Accord: New York Cent. & H. R.R. Co.* v. *York & Whitney Co.*, 256 U.S. 406 (1921); *Louisville & N. R. Co.* v. *Central Iron & C. Co.*, 265 U.S. 59, 65 (1924); *Illinois Steel Co.* v. *Baltimore & Ohio R. Co.*, 320 U.S. 508, 531 (1944); *Wilko* v. *Swan*, 346 U.S. 969 (1953); *Hoffman* v. *Gleason*, 107 F. 2d 101, 104 (6th Cir. 1940).

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[4] Cases such as *Callanan Road Improv. Co.* v. *United States*, 345 U.S. 507 (1953), and *Commissioner* v. *National Lead Co.*, 230 F. 2d 161 (2d Cir. 1956), *aff'd*, 352 U.S. 313 (1957), did not involve contracts but administrative licenses.

[5] *Matson Navigation Co.* v. *United States*, 284 U.S. 352 (1932), involved a statutory requirement for "just compensation." That concept is far from a prescribed formula, and in any event the contract there involved a settlement of the amount—an accord and satisfaction. No such settlement of a doubtful quantity is involved in this case.

The waiver or estoppel issue was not mentioned in the petition for certiorari or in the Government's memorandum filed in response thereto, and it was therefore not discussed in Eastern's brief. There is no conflict of authority on the point. It has been uniformly rejected. The relevant decisions may be found in Eastern's opening brief (East. Br. 18 and 25).

II. SLIDING SCALE OF PROFIT SHARING

The Government admits (Govt. Br. 26-27) that section 709(a) does not authorize profit sharing in excess of 50 percent. It contends, however, that section 5(b) does confer this authority and it is immaterial that Maritime may have relied upon section 709(a) in making the excess charge. Section 709(a) is thus construed by the Government to fix a minimum formula only.

Under this interpretation, section 709(a) may be so rewritten by Maritime, for purposes of both the 1936 and 1946 Acts, as to become meaningless. If section 709(a) fixes only a minimum, then section 5(b) (and the parallel section 714 of the 1936 Act (46 U.S.C. § 1204)) may be interpreted to justify exaction of 100 percent of profits, to eliminate the 10 percent return on capital to be retained by the charterer if earned; and to eliminate any cumulation or offsetting of profits or losses over the period of the charter. If Congress meant to grant such broad discretion, there would have been no need to establish a profit sharing formula.

Clearly, the Government's position is based upon a partial reading of section 5. While the first sentence of subsection (b) of that section confers some discretion, stating, in part, that Maritime may fix additional charter hire "at such rate as the Commission deter-

mines to be consistent with the policies of this Act, . . ." the next word in that sentence is *"but."* Thereafter follow the limitations imposed by Congress on that discretion. The Government recognizes only two of these limitations—the first being the 15 percent floor; and the second, the world market charter rate floor, if four members of the Commission concur. It ignores the third limitation—the profit sharing provision—which is stated as a directive to Maritime. That limitation is as much a part of the statute as the first two. The fact that Maritime might have fixed a basic rate of hire in excess of 15 percent under section 5(b) is not a valid basis for ignoring the profit sharing formula set by section 5(c). As was pointed out by Eastern (East. Br. 36-37), the impact of an increase in basic hire would have fallen on the Government, whereas an increase in profit sharing would fall only on the charterers.

In support of its argument as to section 5(b), the Government (Govt. Br. 24) cites the opinion of the Third Circuit in *American President Lines, Ltd.* v. *United States*, 265 F. 2d 552 (1959), *affirming* 162 F. Supp. 732 (D. Del. 1958). In that case the charters contained the 50 percent profit formula of section 709 (a), not the sliding scale. The only question was the computation of the vessel price upon which the amount of basic charter hire should be computed. In one of the charters the basic hire was 8½ percent of the statutory sales price, and in another, 5 percent, with 3½ percent additional if earned. The extract from that case (Govt. Br. 24) refers only to basic hire, and not, as the Government implies, to additional charter hire, with which the present case is concerned. This decision emphasizes, as does the later *American President*

Lines case (East. App. A, p. A7), that the only effective way to discourage chartering would be to raise the basic hire, which Maritime did not wish to do because government agencies objected.

The Government suggests (Govt. Br. 28-29) that the 25 and 40 percent excess portions of additional charter hire were necessarily charged under section 5(b), rather than section 709(a), because there is nothing in the record to show reliance upon 709(a) in assessing the charge. It relies upon a "presumption of administrative regularity," saying that Eastern has not sustained the burden of rebutting this presumption.

In contrast to the Government's reliance upon presumption are: (a) the written records of Maritime (East. Br. 37, ftn. 42) showing that Maritime acted under section 709(a); (b) the regulations and contract provisions appearing on the foldout sheet to that brief; (c) the finding of the Court of Claims in *American Export,* 290 F. 2d 925, 931, that the Government's contention that the sliding scale was charged under section 5(b) was an "afterthought"; and (d) the rejection of the claim in *Dichmann, Wright & Pugh,* 144 F. Supp. 922, 925, and in *American Mail Line,* 213 F. Supp. 152, 163 (after a trial).

The Government suggests (Govt. Br. 24) that the world market charter rate was 45.6 percent of the statutory sales price in August 1946. This figure appears in the McDaniel affidavit (R. 151), and is in turn based upon a formula prepared by another staff member who did not submit an affidavit. There is no evidence that this figure was ever submitted to the Maritime Commission, and memoranda actually considered when the 15 percent rate was selected show that the Commission would not have regarded this spot rate to be ma-

terial because declines were expected shortly in world rates, the subcharter and freight rates were controlled through government monopoly and by regulation, and some vessels would not justify a rate even of 15 percent (East. Br. 34-36, ftns. 36-40).[6] Indeed, in view of the Government's monopoly, it is doubtful whether the concept of a world market rate is meaningful.

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[6] Exhibits introduced by government affiant McDaniel in *Smith-Johnson Steamship Corp.* v. *United States*, 142 F. Supp. 367 (Ct. Cl. 1956) show:

> "Foreign ships are being offered in the American market at time charter rates which work out much lower than the corresponding rates under the proposed bareboat basis of 15% of the value appearing in the schedules given out by the USMC. Some of the operators stated clearly that such charters of foreign ships were an inducement, since there were no trading restrictions, no recapture of profits, and a limitation of risks. (From p. 5 of notes of meeting with industry on February 6, 1946.)
>
> . . . . . .
>
> Under the terms of the Ship Sales Bill, charter rates are to be not less than 15 percent of adjusted statutory sales price, except upon the affirmative vote of four Commissioners. These terms would result in a rate per deadweight ton per month for a Liberty ship of from 61 cents to 74 cents, depending on the age of the vessel. American charterers are subject, furthermore, to the recapture provisions of the Merchant Marine Act of 1936. It appears evident from an examination of British and American charter rates on 10,000 ton tramps, that American operators might well be under considerable competitive disadvantage unless the Commission were to determine to lower minimum rates as provided for in the Ship Sales Bill. (Memorandum dated February 12, 1946, from Division of Vessel Disposal to Maritime Commission, p. 6.)
>
> . . . . . .
>
> Certain indications received by this Division, including the charter terms of the British ship disposal program, would indi-

III. THE "CHARTER HIRE RESERVED" ACCOUNTING PROBLEM

It was pointed out by Eastern (East. Br. 43-46) that less additional charter hire would be payable if the sliding scale is to be justified by reliance upon section 5(b) rather than section 709(a). The reduction is described in the opening brief (East. Br. 43-46) and in the supplemental affidavit of Robert A. Caswell (R. 40-43). Since, under the Government's theory, the only purported source of authority for the excess profit sharing percentages is section 5(b), it necessarily follows that these portions must be regarded as "charter hire reserved in the charter" within the meaning of section 709(a). It seems to concede (Govt. Br. 29-30), as contended by Eastern, that if these excess portions were lawfully exacted as "charter hire reserved," they must be deducted from profits first before computing the additional charter hire due at the 50 percent rate. But it fails to explain the statutory or contractual basis for the conversion by its affiant (R. 134) of the 25 and 40-percent excess portions mentioned in the charter to 50 and 80 percent, respectively, which becomes necessary to justify the collection by the Government of the amount it claims under the charter.

In an effort to avoid the force of Eastern's argument concerning "charter hire reserved," the Govern-

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cate that the world market rate may be below 15 percent of the statutory sales price of comparable vessels. There is also the possibility that foreign interests may purchase vessels from the Commission and subsequently charter them for less than 15 percent of the statutory sales price. This would appear to jeopardize the competitive position of American charterers. (Memorandum from Division of Vessel Disposal, approved by Maritime Commission May 31, 1946.)

ment asserts (Govt. Br. 30) that Eastern eliminated this issue from the case when it stipulated that the judgment on the Government's second cause of action (sliding scale) should be $64,000. The Government has misrepresented the effect of the stipulation. After the court below had found all issues against Eastern, including the "charter hire reserved" issue (R. 20-21), which affected the amount due on the sliding scale cause of action, the damages were agreed upon to simplify the entry of judgment and the appeal. The stipulation (R. 136) states specifically that it is:

> without prejudice to the right of libelant-cross-respondent Massachusetts Trustees of Eastern Gas and Fuel Associates . . . to appeal from any judgment . . . awarding damages to respondent-cross-libelant [the Government] on the latter's second separate cause of action [sliding scale], . . .

Eastern stipulated only the amount to which the Government would be entitled under the rationale of the decision of the district court which rejected the position of Eastern.

IV. POSTENACTMENT COMMENT OF CONGRESSIONAL COMMITTEES AND CONSISTENT ADMINISTRATIVE PRACTICE

The Government asserts (Govt. Br. 31) that postenactment congressional committees knew about the sliding scale when the chartering authority was extended, and thus the lawful charge has legislative sanction and direction, notwithstanding section 709(a). This argument was specifically rejected in *Dichmann, Wright & Pugh, Inc.* v. *United States*, 144 F. Supp. 922, 926 (S.D.N.Y. 1956), and in *American Mail Line, Ltd.* v. *United States*, 213 F. Supp. 152, 163-64 (W.D.

Wash. 1962). The argument has been advanced in all lower courts by the Government and none has accepted it.

The argument has no merit because an erroneous administrative interpretation is not deemed to be ratified by reason of reenactment of legislation. In *Biddle* v. *Com. of Internal Revenue*, 302 U.S. 573, 582 (1938), Mr. Justice Stone said:

> Where the law is plain the subsequent reenactment of a statute does not constitute adoption of its administrative construction. . . .

And in *Manual Enterprises* v. *Day*, 370 U.S. 478, 518 (1962), the concurring opinion of Justice Brennan, joined by Chief Justice Warren and Justice Douglas, stated:

> But, in any event, testimony before [congressional] committees, committee reports, and administrative usurpation, do not, either singly or collectively, suffice to establish authorization.

In *United States* v. *Philadelphia Nat. Bank*, 374 U.S. 321, 348-49 (1963), the Court, quoting from an earlier case, said:

> "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one. . . ."

See also *Federal Com. Commission* v. *Columbia B. System*, 311 U.S. 132, 137 (1940); *United States* v. *Missouri P. R. Co.*, 278 U.S. 269 (1929); and *American President Lines, Ltd.* v. *United States*, 291 F. 2d 931, 936 (Ct. Cl. 1961), where the court rejected the argument that congressional committee pressure may be re-

lied upon as authorization for unfair or discriminatory action under the Maritime statutes.

In this case, the Chairman of the House Merchant Marine Subcommittee, who exercised an important influence over the contents of the postenactment congressional reports cited by the Government, was opposed to the chartering program of the 1946 Act, believing in direct government operation of the vessels.[7] He was openly unsympathetic with the plan of the 1946 Act, which was to take the Government out of the shipping business and return the industry to the hands of private operators.[8]

With its argument concerning congressional ratification, the Government says (Govt. Br. 31) that the Commission has consistently interpreted its statutory authority to authorize rentals of over 50 percent of excess profits, and that considerable weight should be given to this interpretation. In this connection, it should be pointed out that in January 1957, four

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[7] Hearings before the Subcommittee on Ship Sales, Charters, and Lay-Ups of the House Committee on Merchant Marine and Fisheries (80th Cong., 1st Sess., June 11, 1947, p. 646).

[8] The Government misreads the legislative history and other background material in stating (Govt. Br. 3), that the WSA chartering program was "designed as an experiment, to test the rate suitable for chartering (R. 44-45)." For this statement, it relies upon a Maritime Commission staff memorandum dealing with chartering, dated August 7, 1946, and implies that the WSA charters were to test the rate of charter hire to be used in the later Form 303 charters. The staff memorandum (R. 45) actually says something completely different:

> The original charter plan was of an experimental nature *to test the rate at which the government could get out of business*, . . . (Emphasis added)

months after the decision in *Dichmann, supra*, holding the sliding scale illegal, Maritime eliminated the sliding scale provision from clause 13 of its standard charter, which now reads:

> CLAUSE 13. *Statutory additional charter hire.* The parties mutually agree that, in addition to the charter hire required under Clause 12, Part II, of the Agreement, as amended, the Charterer shall pay over to the Owner *such statutory additional charter hire as may be required by the provisions of section 709 of the Merchant Marine Act, 1936, as amended.* The time of payment shall be as provided by regulations of the Owner. (Emphasis added.) (22 F.R. 609, Jan. 30, 1957; now codified in 46 C.F.R. § 299.130, revised Jan. 1, 1958, p. 578.)

It is also difficult to reconcile the consistent administrative interpretation argument with Maritime's "mandatory" regulation, which has been in effect since 1946, stating that every charter must contain provisions identical with section 709(a). See 46 C.F.R. § 299.31(g), quoted on the foldout sheet to Eastern's opening brief.

V. QUANTUM VALEBAT

The Government urges (Govt. Br. 33-38) that if this Court should find the sliding scale portions of hire to be in violation of statute, then the charter must be rescinded and the Government permitted to recover on a *quantum valebat* basis.

As pointed out above in the discussion of waiver or estoppel, the charterers protested and obtained a reservation of rights with respect to payments of additional charter hire, including amounts paid at the sliding scale rates. If they are correct that the amounts in

excess of 50 percent were in violation of the statutes, then they are entitled to a return of the amounts overpaid. There is no basis for a rescission of the charter. The amounts returnable are in all cases ascertainable from the accountings.

The courts have uniformly held, in dealing both with the charter and the sales provisions of the 1946 Act, that the statutory terms are substituted for the unlawful contract terms, and this rule applies even in the absence of an express reservation. There is no conflict of authority on this issue. See the cases cited in the opening brief (East. Br. 18 and 25), and Maritime's regulation quoted on the foldout sheet thereto (46 C.F.R. § 299.56(b)(5)), to the effect that the statute shall prevail over inconsistent contract terms.

Clark v. *United States*, 95 U.S. 539 (1877), relied upon by the Government, is obviously not in point. There, the entire contract violated the statute of frauds and was not enforceable.[9] Here, part of one clause of the charter conflicts with a statute and the rights of the parties concerning its legality were reserved. Section 709(a) prescribes the profit sharing provision that should have been in the charter. Accordingly, there is

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[9] The other cases cited by the Government similarly deal with contracts which, because of the statute of frauds, lack of corporate authority, lack of mutuality, etc., were claimed to be invalid or unenforceable in their entirety. Moreover, in two of the cases cited by the Government, the courts merely declared invalid a part of the contract but enforced the rest of it. *Hitchcock* v. *Galveston*, 96 U.S. 341 (1878); *Steele* v. *United States*, 113 U.S. 128 (1885).

no basis for remanding the matter to the present Maritime Administration for further action.

The *quantum valebat* concept is based upon the theory that, as a result of fraud, mistake or undue advantage taken, something of value has been received in circumstances constituting unjust enrichment. *F. E. Grauwiller Transportation Co.* v. *King*, 131 F. Supp. 630, 634 (E.D.N.Y. 1955), *aff'd*, 229 F. 2d 153 (2d Cir. 1956). None of these elements is presented here. There can be no unjust enrichment where the charterers pay the precise additional charter hire prescribed by Congress. If Maritime had no authority to collect profit sharing in excess of 50 percent by contract, it may not avoid the statutory requirement and accomplish the same result in the guise of *quantum valebat*.

VI. SPLIT ACCOUNTING IN 1947

The Government's position on this point is twofold. First, it contends (Govt. Br. 43) that the amendment to the original charter created an entirely new charter for purposes of section 709(a), and that the calendar year accounting requirement of that section is limited to voyages performed under a single charter. Alternatively, even if the amendment did not create a new charter, it contends (Govt. Br. 44) that Maritime could properly exercise the threat of termination in order to exact more onerous terms from the industry in respect of accounting requirements (just as it was authorized to increase the profit sharing percentage) because section 709(a) was intended to fix minimum terms for the benefit of the Government.

There is no basic dispute as to the facts. The only question is whether the substance of the transaction

was a continuation of the old charter and, if so, whether section 709(a) afforded any protection to the charterers.

The steamship industry was obviously subjected to economic duress when the purported notice of termination was issued. It was attempting to develop post-war trade routes which had been thoroughly disrupted during World War II. It had cultivated shippers, established a recurring pattern of cargo movements, and in other ways sought to reestablish the private United States merchant marine both with owned and chartered vessels. Admittedly, the United States had a monopoly of vessels available for charter, and the abrupt termination of the charters presented the companies who relied upon chartered vessels to rebuild their trade, with the option of breaking preexisting commitments for the vessels, disrupting their trade, and going out of business, or, in the alternative, of accepting Maritime's terms.

Where the only object and the only legal effect of the so-called new charter were to change the statutory accounting period, the new charter should be treated as a fiction and disregarded. Courts have uniformly condemned action by government agencies in imposing, as a condition to participation in governmental programs, the acceptance of unlawful conditions. As was said in *Shay* v. *Agricultural Stab. & Conserv. State Com. for Ariz.*, 299 F. 2d 516, 522 (9th Cir. 1962):

> To permit any such result [giving effect to an unlawful regulation because it was incorporated into a contract], in a contract of adhesion of this type, when the plaintiffs' only real alternatives were to sign it as printed or stay out of the program, would be to punch a hole as wide as a barn

door in the restrictions imposed by the Congress upon the authority of the Secretary.

The foregoing is consistent with a long line of similar cases.[10]

There is no substance to the argument of the Government (Govt. Br. 38-39) that the Foreign Trade Addendum changed the charter terms in any respect favorable to the charterers. The provision prohibiting redelivery until November 1, 1947, was prejudicial to the charterers. The so-called liberalization of the definition of "net voyage profit" in the Foreign Trade Addendum was merely a recognition of the customary accounting practice, theretofore consistently accepted by Maritime, of treating reserves for repairs and insurance as expense, subject to later adjustment on the basis of actual cost. The standard accounting regulations make such a provision applicable to all charters. (46 C.F.R. §§ 299.35(a), 299.36(a), 299.204(9).) The definition of "vessel lay-up expenses" (R. 200) applied only to vessels redelivered after August 15, 1947, and later rechartered. It was a provision more burdensome to charterers than that existing in the original charters.

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[10] See *Brannan* v. *Stark*, 342 U.S. 451 (1952); *Glavey* v. *United States*, 182 U.S. 595 (1901); *International Ry. Co.* v. *Davidson*, 257 U.S. 506 (1922); *MacMath* v. *United States*, 248 U.S. 151 (1918); *United States* v. *Andrews*, 240 U.S. 90 (1916); *United States* v. *Laughlin*, 249 U.S. 440 (1919); *Work* v. *United States ex rel. McAlester-Edwards C. Co.*, 262 U.S. 200 (1923); *Peoples Bank* v. *Eccles*, 161 F. 2d 636, 644 (D.C. Cir. 1947); *rev'd on other grounds*, 333 U.S. 426 (1948); *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464 (1962).

VII. CONCLUSION

Accordingly, petitioners respectfully request this Court to make the determinations set forth at pages 57-58 of their opening brief, to reverse the judgment below, and to remand the case with instructions to enter judgment in accordance with said findings.

Respectfully submitted,

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